Emergency Powers of Local Health Officers
Significant Legislative Rule Analysis
Chapters 246-100 and 246-101 WAC

I. Clearly state the general goals and specific objectives of the statute that the rule implements.

RCW 43.20.050, which defines the powers and duties of the Washington State Board of Health, states in section (2): "In order to protect public health, the state board of health shall…[a]dopt rules for the imposition and use of isolation and quarantine."

II. Determine that the rule is needed to achieve the general goals and specific objectives of the authorizing statute (RCW 34.05.328(1)(b)).

The Board of Health previously has exercised its authority to adopt isolation and quarantine rules by developing rules for specific disease conditions (such as tuberculosis and sexually transmitted diseases) where isolation and quarantine are part of contemporary practice for disease control measures. Current rules do not provide adequate guidance for local health officers concerning the imposition of isolation and quarantine for other than these defined conditions. Given increasing awareness of the possibility of a bioterrorism attack and the growing risks posed by a number of emerging and re-emerging infectious diseases (EIDs), a condition-by-condition approach is no longer adequate to protect the public health. A set of rules for the imposition of isolation or quarantine that ensures adequate and appropriate response in the event of a bioterrorism attack or a major communicable disease outbreak is necessary to meet the general goal of protecting the public health.

III. Determine that the probable benefits of the rule are greater than its probable costs (RCW 34.05.328(1)(c)).

Summary of Cost Benefit Analysis

These rules have the potential to save thousands of lives; hence the probable benefits are so large that they would easily outweigh any associated costs. At the same time, they have to potential to reduce costs by resolving confusion over due process procedures, the roles and responsibilities of public officials, and circumstances under which existing communicable disease control authority would be appropriately used.

Current Legal Authority and Changes Created By the Rule

Local boards of health and local health officers currently have very broad statutory power under Chapter 70.05 RCW to enact rules and take actions necessary to control and prevent the spread of "any dangerous, contagious or infectious disease." These laws were passed at the beginning of the 20th century—back when infectious diseases were the leading cause of death and U.S. life expectancy was less than 50 years—to settle the debate over whether local police powers encompassed public health regulation and enforcement (including isolation and quarantine).

The Washington courts have repeatedly ruled that protecting public health is a fundamental duty of government and that public health laws should be interpreted broadly. Earlier legal challenges have focused on quarantine (1927 and 1918) and mandatory vaccination (1922). More recent challenges have centered on cigarette ads (1997), fluoridation (1954), sewer regulation (1973), and needle exchange (1992). [1] Similar laws have been challenged—and upheld—in jurisdictions across the country.[2]

The proposed rules, therefore, would not create any new authority for local health officers to detain for the purposes of isolation and quarantine. Instead, they would temper existing authorities by creating procedures that reflect modern concepts of what constitutes adequate due process. It is not clear whether the existing statutory authority for isolation and quarantine, absent minimal due process protections, would be sustained by the courts if challenged.[3]

The proposed rules also contain enforcement provisions. These make reference in rule to existing statutes. RCW 70.05.120 already makes it a misdemeanor for anyone to disobey "any of the rules, regulations or orders made for the prevention, suppression, and control of dangerous contagious and infectious diseases by the local board of health or local health officer or administrative officer." An existing Board rule, WAC 246-101-425, already stipulates, "Members of the general public shall…[c]ooperate with the implementation of infection control measures, including isolation and quarantine.

With regard to law enforcement agencies enforcing isolation and quarantine orders, RCW 43.20.050(4) requires that all police officers, sheriffs and constables enforce all Board of Health rules, and failure to do so is a misdemeanor. Establishing rules for isolation and quarantine would make RCW 43.20.050(4)

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[1] For a more in-depth discussion of current legal authority of local health officers and local boards of health in Washington, see Joyce A. Roper, "Public Health Emergencies—Current Legal Authority," memorandum to Mary Selecky and Nancy Ellison, February 1, 2002 (privilege waived).

[2] Fidler, David P et al. "Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law," *The International Lawyer*, Fall 1997.

[3] Ibid.

applicable in isolation and quarantine circumstances and would specify the duties and accountability of law enforcement officers.

Because there is existing authority for isolation and quarantine and existing requirements to comply with a health officer's orders, the cost benefit analysis for this rule does not need to consider the costs and benefits associated with health officers ordering isolation and quarantine or calling on law enforcement to enforce their orders. Instead, the costs and benefits of the proposed rules are those associated with establishment of procedures for isolation and quarantine and with extending due process protections to individuals who are subject to isolation and quarantine orders.

Potential Benefits

Many medical and terrorism experts argue that the most likely event requiring mass isolation and quarantine would be the spread of smallpox through an act of bioterrorism.

Recently published research suggests that if current federally recommended vaccination protocols were applied in response to a smallpox outbreak, it would take a year to extinguish the outbreak. Modeling suggests there would be 367,000 cases of smallpox and 110,000 deaths.[4]

The 1999 consensus statement on smallpox stated:

> *"Although cooperation by most patients and contacts in observing isolation could be ensured through counseling and persuasion, there may be some for whom forcible quarantine will be required. Some states and cities in the United States, but not all, confer broad discretionary powers on health authorities to ensure the safety of the public's health and, at one time, this included powers to quarantine. Under epidemic circumstances, this could be an important power to have. Thus, each state and city should review its statutes as part of its preparedness activities."*[5]

A June 2001 training scenario called Dark Winter postulated a fictional smallpox outbreak with 20 cases in Oklahoma and suspected cases in two other states. Two simulated weeks into the worst-case scenario there were 16,000 cases and 1,000 deaths—and predictions of 300,000 victims within three weeks. A third of the victims would die. One of the areas of contention during the exercise was isolation and quarantine. Participants argued over who should make decisions regarding voluntary or coercive quarantine and whether to close borders, effectively quarantine large geographic areas.

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[4] Broad, William J. "Study Favors New Tack on Smallpox," *New York Times*, July 9, 2002.

[5] Henderson et al. "Smallpox as a Biological Weapon: Medical and Public Health Management" *JAMA*, 281:22, June 9, 1999.

A May 2000 field exercise known as TOPOFF (short for "top officials") simulated the release of aerosolized plague bacilli over Denver. When the scenario ended after a simulated week, there were about 1,000 to 2,000 dead and roughly 4,000 or more cases of plague. As part of the efforts to control the disease, Colorado officials issued an order quarantining all Denver residents in their homes, but had difficulty instituting and enforcing that quarantine. Participants also closed the borders of the state (although the decision-making group never formally decided to do so).[6]

David Fidler points to TOPOFF as an example when he writes: "In simulated bioterrorism exercises, implementation of legal powers to respond to a public health emergency often failed because the government lacked personnel, resources strategies, and protocols to carry out the actions required."[7]

Published expert legal analyses have argued have argued that the archaic nature of public health laws are likely to hinder response to a bioterrorism attack or an EID outbreak.[8, 9,10] For example, Fidler et al. note:

> *"Unfortunately, many state public health statutes are either too vague or too disease specific to offer guidance to health officials in an emergency. Because public health officials and law enforcement officers may fear litigation as much as contagion, policy makers and legislators should clarify public officials' authority and various participants' roles in health emergencies….*
>
> *"Absent clear statutory authority with prearranged procedures whereby law enforcement officers will implement legitimate health orders, the health officer may have to rely on a necessity defense to criminal or tortuous charges of false imprisonment. Lawyers, legislators, and policy makers anticipating EIDs should be in a position to delineate the criteria under which and the mechanisms by which a health officer in an emergency may restrain a person."*

The federal government has been unequivocal about the importance of this kind of work to bioterrorism preparedness. The Centers for Disease Control and Prevention (CDC) strongly encouraged states to include in the work plans they submitted to qualify for federal bioterrorism preparedness funds a plan for reviewing and strengthening state public health laws, including those governing

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[6] Inglesby, Thomas V., Rita Grossman, and Tara O'Toole. "A Plague on Your City: Observations from TOPOFF," *Clinical Infectious Diseases*, 2001;32:436-445.
[7] Fidler, David P. "The Malevolent Use of Microbes and the Rule of Law: Legal Challenges Presented by Bioterrorism," *Clinical Infectious Diseases*, 2001; 33:686-689.
[8] Ibid.
[9] Gostin, Lawrence O., Scoot Burris and Zita Lazzarini. "The Law and the Public's Health: A Study of Infectious Disease Law in the United States," *Columbia Law Review*, January 1999.
[10] Fidler et al, op cit.

isolation and quarantine.[11] The federal smallpox emergency response plan says, "Local or state legal statutes regarding public health authority to isolate or quarantine infectious or potentially infectious and incubating persons need to be reviewed."[12] Several components of the proposed rules are based on the isolation and quarantine sections of a model act developed at the request of the CDC.[13]

The Board knows of no modeling studies or exercises that suggest a specific figure for the number of lives that might be saved by instituting isolation and quarantine measures during a bioterrorist attack or an outbreak of a particular infectious disease. Based on exercises and drills and the advice of legal and medical experts, however, it is reasonable to conclude:

(1) the authority to order isolation and quarantine must remain part of the armamentarium of public health in the event of a bioterrorist attack or major infectious disease outbreak; and
(2) prearranged procedures for enforcement and for due process protections are prerequisites for the effective implementation of isolation and quarantine during a public health emergency.

Given the extent of morbidity and mortality that would be possible during a bioterrorism event or major disease outbreak, it is equally reasonable to conclude that the ability to effectively institute isolation and quarantine measures could save thousands, perhaps tens of thousands, of lives. The state Department of Health currently values a statistical life at $4 million, so the potential value of these rule could be in the billions of dollars.

Potential Costs
These rules will be implemented only in extraordinary circumstances. There are no ongoing, regular, or immediate costs associated with compliance.

It is easy to envision potential costs to individuals and businesses from mandatory isolation and quarantine. Possible examples include: (1) an essential employee is quarantined and is not able to attend a critical meeting; (2) a hotel is commandeered as a quarantine facility and closed to paying guests; (3) a hospital is delegated as a receiving facility for persons exposed to smallpox and loses future patients because of fears of contamination.[14] The proposed rule change, however, is limited in scope and does not grant new authorities. It defines procedures and processes that would accompany the issuance of an order to detain

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[11] This was a component of Critical Capacity A, Benchmark #4, the intent of which was described in detail in the "Summary of Available Resources: Bioterrorism Preparedness and Response Program" distributed to states by the CDC on March 19, 2002.
[12] Centers for Disease Control and Prevention. "Draft 2—Annex 4—Suggested Pre-Event Activities for State and Local Health Authorities," *Interim Smallpox Response Plan & Guidelines*, January 23, 2002.
[13] Center for Law and the Public's Health, *Draft Model State Emergency Health Powers Act*, December 21, 2002.
[14] It is also possible to envision savings in addition to any avoided morbidity and mortality—for example, avoided liability costs.

a person or group for purposes of isolation and quarantine. Because the proposed rules contain due process protections, they would presumably lessen the risk that existing authority would be misused or abused, thereby lessening the risk that individuals and businesses would sustain costs associated with unwarranted or excessive detention.

Due process requirements that were overly burdensome might hinder the ability of local health officials to respond to a disease outbreak—if, say, they are forced to spend that bulk of time in court justifying their actions rather than in the field preventing further spread of the disease. Clearly, if due process requirements weakened the ability of public health to respond to an emergency, the costs could be enormous in terms of loss of life.

Modern case law makes it clear that some level of due process protection is required whenever there is a denial of liberty. Mandatory isolation and quarantine absent any due process might be unconstitutional unless a clear showing could be made that the loss of liberty was justified by a clear, imminent, and extremely serious threat to the public health and welfare. Therefore, it can be argued that due process guarantees for isolation and quarantine already exist—they have just not been defined yet in statute, rule, or recent case law. If due process procedures are not defined in statute or rule, the courts will very likely define them if and when public health authorities exercise their isolation and quarantine powers.

The 9th Circuit U.S. Court of Appeals has described the balancing act that will be required of the courts this way: "In determining whether due process requires a particular procedure, a court must weigh 'the liberty interest of the individual' against the government's 'legitimate interests in confinement' including the fiscal and administrative burdens additional procedures would entail."[15]

Absent a specific ruling from the courts, the Board must rely on the best available legal and medical evidence and opinion as to the necessary scope of due process protections and the advantages of establishing procedures in law prior to any bioterrorism attack or other health emergency.

Should isolation and quarantine authority ever be implemented under the proposed rules, there will be costs in complying for the courts, which will have to hear petitions and appeals, and for local jurisdictions, which will need to seek judicial review of extended detentions and respond to petitions by the persons subject to isolation and quarantine orders. Once again, however, due process protections are constitutional in origin. Even without the proposed rules, people subject to isolation and quarantine may petition the court for judicial review of the quarantine order or the conditions of quarantine. Some of the costs may be incurred without the rule in place, and having procedures worked out in advance may even reduce the costs associated with judicial hearings.

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[15] U.S. v. Sahhar, 917 F.2d 1197,1206 (9th Cir. 1990), cert. denied 499 U.S. 963.

Cost may be limited, as well, by another factor. Local health officers need authority to isolate and quarantine in order to respond early and effectively to a possible bioterrorism attack or similar health emergency. A major and sustained outbreak of a communicable disease, particularly one of bioterrorism origin, is likely to prompt an emergency declaration, which would give the governor and the secretary of health authority to institute coercive disease control methods.

Given the fact that some legal and judicial costs are unavoidable and others would be offset by savings, and the likelihood that in a major health emergency the proposed rules would apply during a finite period between the recognition of a likely threat and the issuance of a gubernatorial emergency declaration, compliance costs will me minimal compared to the billions of dollars in potential benefits described above.

IV. Determine, after considering alternative versions of the rule, that the proposed rule is the least burdensome alternative for those required to comply with it that achieves the goals and objectives of the authorizing statute (RCW 34.05.328(1)(d)).

Those who would be required to comply with the proposed isolation and quarantine rules are member of the judiciary, local health officers, local boards of health, law enforcement, and persons subject to isolation and quarantine orders. None of these groups would experience ongoing and regular burdens as a result of this rule. In the unprecedented event of a bioterrorism attack or other health emergency that involves a highly infectious agent for which isolation and quarantine would be medically appropriate control measures, there would be burdens placed on all of these groups. The Board did consider alternative versions of the rule and chose the least burdensome option that would allow it to meet the fundamental requirement of the authorizing statute—that it protect the public's health.

- The proposed rules allow a local health officer to order isolation or quarantine for up to ten days without judicial review. The incubation period for smallpox is up to 17–19 days, so there may are medical reasons to isolate or quarantine for up to that length of time. The shorter the time period, the greater the burden on a local health officer working to control an epidemic. At the same time, most state statutes and rules that allow the government to deny liberty for health-related reasons provide for prior judicial review or judicial review within 72 hours. Both prior review and a 72-hour rule could be unduly burdensome to a local health officer during a large-scale emergency, but long periods of detention are burdensome on the individuals detained. The Board considered requiring prior judicial review, a 72-hour rule, and a rule based on the incubation period for possible diseases .The proposed 10-day rule, which borrows from the

Draft Model State Emergency Health Powers Act, is an attempt to balance the needs—and burdens—of the government and the individual.

- The Board considered a rule requiring the government to appoint and pay for counsel for persons who are indigent and or indigent and able to contribute as defined in statute. The right to government-funded counsel is constitutionally required in criminal cases and has been extended in some civil circumstances. This provision was not included in the draft rule because it would be overly burdensome on local jurisdictions in the event of mass quarantine and isolation.

V. Determine that the proposed rule does not violate any other federal or state statute (RCW 34.05.328(1)(e)).

The proposed rules are not in violation of another federal or state law.

VI. Determine that the proposed rule does not impose more stringent performance from private entities than public entities (RCW 34.05.328(1)(f)).

The proposed rules apply the same processes and protections to all persons and groups or persons.

VII. Determine that the rule does not differ from federal regulation or statute, which is applicable to same activity or subject matter, or justify difference (RCW 34.05.328(1)(g)).

There are no known federal regulations that regulate this same activity.

VIII. Determine that the rule is coordinated, to the maximum extent possible, with other federal, state, and local laws applicable to the same activity or subject matter (RCW 34.05.328(1)(h)).

The proposed rules do not relate to or conflict with federal, state, or local laws.